



THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

April 14, 2006

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515-6216

Dear Representative Conyers:

Thank you for the letter from Chairman Sensenbrenner and you regarding the Commission's jurisdiction over broadband Internet access services and related issues. The Commission is responding to your request as an official request of a Congressional Committee, *see* 16 C.F.R. § 4.11(b).

As a general response to your inquiry, the Commission believes that broadband Internet access services are non-common carrier services and are clearly within the FTC's jurisdiction. As you know, common carriers subject to the Communications Act of 1934 and its amendments are exempt from the FTC Act. Common carriage is ordinarily characterized by the offering of a service of carrying for the public generally and without modification of the content of what is carried.¹ Furthermore, an entity is a common carrier under the Communications Act only with respect to services it provides on a common carrier basis.² The Communications Act specifically distinguishes between "telecommunications services," which are services provided on a common carrier basis, and "information services," which are not. To the extent an entity provides non-common carrier services such as "information services," the Commission considers the provision

¹ *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC* ("NARUC I"), 525 F.2d 630, 640-642 (D.C. Cir. 1976); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC* ("NARUC II"), 533 F.2d 601, 608-609 (D.C. Cir. 1976); *FTC v. Verity Int'l, Ltd.*, No. 04-5487-CV, 2006 WL 768547, at *7-8 (2d Cir. 2006).

² *NARUC I*; *NARUC II*; *see also* 47 U.S.C. § 153(43), (44) and (46) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services. . .").

of those services to be subject to the FTC Act's prohibitions against engaging in deceptive or unfair practices and unfair methods of competition.³

The FTC is committed to maintaining competition and to protecting consumers from deceptive or unfair acts or practices relating to products and services within its jurisdiction, including non-common carrier Internet-related services. The following discussion addresses your specific questions.

Question #1: Does the FTC interpret the *Brand X* decision and the *Wireline Broadband Internet Access Order* to have shifted any responsibilities from the Federal Communications Commission (FCC) to the FTC?

These two decisions have helped to clarify the status of two particular broadband Internet access services: cable modem Internet access service and wireline broadband Internet access service provided by facilities-based carriers.⁴ Other types of Internet access service have long been treated as non-common carrier services. For example, Digital Subscriber Line (DSL) Internet access by non-facilities-based Internet service providers (ISPs) and dial-up Internet access continue to be subject to FTC jurisdiction.

In *Brand X*, the Supreme Court upheld a determination by the FCC that cable modem Internet access service is an "information service" and not a common carrier service under the Communications Act. The Supreme Court reversed a Ninth Circuit decision that found the service to be common carriage and vacated the FCC's determination on this point. Especially in light of this Supreme Court decision, the Commission views the provision of cable modem services as non-common carrier service subject to the FTC Act's prohibitions on unfair or deceptive acts and practices and on unfair methods of competition.

With respect to wireline service, prior to the *Wireline Broadband Internet Access Order*, the FCC had classified wireline broadband Internet access service by facilities-based carriers as a common carrier service. In the *Order*, the FCC re-classified this service as an information service and not a common carrier service.⁵ The *Order*, however, permits facilities-based wireline carriers to elect to provide transmission for wireline broadband service on a common carrier basis.

³ See discussion in *FTC v. Verity Int'l Ltd.*, 194 F.Supp. 2d 270, 274-277 (S.D.N.Y. 2002), aff'd in part, rev'd in part, No. 04-5487-CV, 2006 WL 768547 (2d Cir. 2006).

⁴ Facilities-based carriers own the transmission facilities they use to provide Internet access.

⁵ A consolidated appeal of the order is pending in the Third Circuit. *Time Warner v. FCC*, No. 05-4769 (3d Cir. filed Oct. 26, 2005).

Thus, the FTC has authority over the provision of wireline broadband Internet services on a non-common carrier basis. The common carrier exemption in the FTC Act may, however, preclude FTC jurisdiction over transmission services that a wireline carrier elects to provide on a common carrier basis pursuant to the *Order*.

Question #2: What are the FTC's views with regard to the FCC's exercise of Title I ancillary authority over broadband Internet access services?

The FTC takes no position on the FCC's exercise of Title I ancillary authority over broadband Internet access services. The FTC will coordinate with the FCC to the extent that these services are subject to concurrent FTC and FCC jurisdiction.

Question #3: Due to the *Brand X* decision and the *Wireline Broadband Internet Access Order*, does the FTC view itself as the federal agency with primary jurisdiction over consumer protection and competition issues relating to broadband Internet access in the United States? If so, does this also apply in circumstances in which providers can choose whether or not they are common carriers? Also, please explain the extent of the FTC's current jurisdiction over broadband Internet access services.

The FTC is the only federal agency with general jurisdiction over consumer protection and competition in most sectors of the economy, including broadband Internet access services. In particular, we consider the provision of cable-modem and DSL services generally to be subject to FTC jurisdiction. The *Brand X* decision and the *Wireline Broadband Internet Access Order* support this view.

The FTC's combination of consumer protection and competition authority over most of the economy allows the FTC to take action in appropriate circumstances with a uniquely well-rounded perspective on market processes as a whole. The FCC has a special position with respect to certain kinds of telecommunications services, which in our view does not conflict with the FTC's authority over consumer protection and competition issues relating to broadband Internet access. In addition, the Department of Justice (DOJ) shares general antitrust authority with the FTC regarding most sectors of the economy. As detailed below, the FTC routinely coordinates with the FCC and DOJ.

As noted above, some types of Internet access service have long been recognized as non-common carrier services within FTC authority. In fact, for nearly a decade, the FTC has investigated and brought enforcement actions against ISPs for allegedly deceptive marketing, advertising and billing practices. See e.g., *In the Matter of America Online, Inc. and Compuserve Interactive Services, Inc.*, Dkt. C-4105 (Jan. 28, 2004) (consent order); *In the Matter of Juno Online Services, Inc.*, Dkt. C-4016 (Jun. 25, 2001) (consent order); *In the Matter of WebTV Networks, Inc.*, Dkt. C-3988 (Dec. 8, 2000) (consent order); *In the Matter of AOL, Inc.*, Dkt. C-3787 (Mar. 16, 1998) (consent order); *In the Matter of CompuServe, Inc.*, Dkt. C-3789 (Mar. 16,

1998) (consent order). Although all of these cases involved the provision of dial-up Internet access, the orders obtained are not limited by their terms to the offering of narrowband Internet access.

With respect to competition enforcement, the FTC has investigated and brought enforcement actions under the antitrust laws where appropriate in cases involving issues of access to content via broadband and other Internet access services. In one instance, the consent order in the AOL/Time Warner merger requires the merged company to open its cable system on a nondiscriminatory basis to competitor ISPs, including those offering broadband, for all content. *See AOL/Time Warner, Inc.* Dkt. C-3989 (Apr. 17, 2001) (consent order). More recently, the FTC investigated the acquisition by Comcast and Time Warner of the cable assets of Adelphia Communications, and a related transaction in which Comcast and Time Warner swapped various cable systems. The FTC examined, among other things, the likely effects of the transactions on access to and pricing of content. Ultimately, a majority of the Commission concluded that the acquisitions were unlikely to foreclose competitor cable systems in any market, or to result in increased prices for Time Warner or Comcast content, and closed the investigation.⁶

If, however, an entity elects to provide wireline broadband transmission on a common carrier basis pursuant to the *Wireline Broadband Internet Access Order*, the common carrier exemption in the FTC Act may apply to the offering of that service.

Question #4: Does the FTC intend to exercise regulatory jurisdiction over broadband Internet access services provided by cable companies and Incumbent Local Exchange Carriers (ILECs), including complaints from consumers, content providers and other affected parties?

The FTC is primarily a law enforcement agency and exercises its jurisdiction primarily by conducting investigations and bringing enforcement actions; that is, the FTC does not exercise “regulatory” jurisdiction in the sense of economic regulation or industry management. As noted above, the FTC has investigated and brought enforcement actions against ISPs for allegedly deceptive practices and where appropriate has enforced the antitrust laws in cases involving issues of access to broadband and other information access issues. We believe that the FTC has jurisdiction to investigate and bring cases involving broadband Internet access services, including cable modem and DSL services.

⁶ See Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications, FTC File No. 051 0151 (Jan. 31, 2006); *but see* Statement of Commissioners Jon Leibowitz and Pamela Jones Harbour (concurring in part, dissenting in part). Both statements are available at <http://www.ftc.gov/opa/2006/01/fyi0609.htm>.

The FTC will continue to take very seriously its responsibility to maintain competition in the high-tech marketplace and to ensure that consumers are protected from unfair and deceptive acts and practices in this area. We welcome complaints and other input from consumers, content providers, and other interested parties regarding possible violations of the FTC Act.

Question #5: Has the FTC communicated with the FCC about jurisdictional responsibilities related to broadband Internet access service? If so, what was the content and outcome of those discussions?

Over the past several years, the FTC and the FCC have had an open-ended dialogue regarding issues in which our interests and jurisdictions connect, such as telemarketing and the pretexting of telephone records. These discussions have not focused specifically on broadband Internet access service. However, staff of the two agencies have engaged in discussions about the nature of common carrier service under the amended Communications Act and about the nature and effects on consumers of the FTC's jurisdictional limitations, issues relevant to broadband service. One outcome of the ongoing dialogue between the two agencies has been cooperation in areas of mutual interest, such as enforcement of the Do Not Call regulations.

Question #6: Has the FTC ever addressed and resolved an issue related to broadband Internet access? Are any complaints, actions, or proceedings that relate to broadband Internet access services currently pending before the FTC? If so, please describe.

As discussed above, the FTC's merger investigation of Time Warner and AOL involved core issues of Internet access. The consent order settling this case addressed Internet access in several markets, including some broadband markets. The relief obtained by the Commission included a requirement that the merged entity open its cable system to competitor ISPs. In addition, the company is prohibited from interfering with content of non-affiliated ISPs and from interfering with the ability of non-affiliated providers for interactive TV services to access the AOL Time Warner system. Further, the company is required to market and offer AOL's DSL services to subscribers in Time Warner cable areas where affiliated cable broadband service is available in the same manner and at the same retail pricing as they do in those areas where affiliated cable broadband ISP service is not available.

The FTC has addressed issues of Internet access in a number of other merger investigations, as well as related issues that often arise in horizontal mergers of cable TV systems and mergers of cable TV companies and content providers. These cases often raise issues of Internet access, both narrowband and broadband. The FTC has also addressed and resolved competitive issues involving media access and issues arising from the mergers of competing cable systems. *See, e.g., Cablevision Systems Corp.*, Dkt. C-3804 (Apr. 27, 1998) (consent order); *Summit Comm. Group*, Dkt. C-3623 (Oct. 20, 1995) (consent order).

The FTC has not brought consumer protection cases that involved specifically the provision of broadband Internet access services. The FTC has brought a wide range of enforcement actions involving other Internet-related activities including deceptive marketing of Internet access services (as detailed above), and other practices allegedly involving misuse of a computer's Internet connections, or unauthorized manipulation of standard Internet navigation tools.

In addition, each week the FTC is contacted by more than 20,000 consumers who seek information and/or submit complaints. The FTC maintains a database of these complaints, and makes those relating generally to fraud available to over 1400 state, federal, and some international law enforcement partners through its secure, online, Consumer Sentinel system. That system now houses more than 3 million complaints (excluding those relating to the Do Not Call Registry). The agency, however, does not categorize complaints that relate to broadband Internet access services as a unique type of complaint.

Question #7: Does the FTC intend to open a proceeding or hold a hearing on its jurisdiction over broadband Internet access services in light of recent judicial and regulatory developments?

The Commission has no plans at this time to open a proceeding or hold a hearing focusing on its jurisdiction over broadband Internet access services. As a law enforcement agency, the FTC generally exercises its jurisdiction through investigations and enforcement actions, and expects to do so with respect to broadband Internet access services as appropriate. The FTC also will continue its extensive consumer and business education and outreach on issues concerning the Internet marketplace. We do view recent judicial and regulatory developments as clarifying our broad authority over Internet-related matters.

The Commission does plan to hold hearings later this year on consumer protection issues in Global Marketing and Technology.⁷ The hearings will bring together experts from diverse fields to explore the consumer protection issues and challenges arising from convergence in communications technology and the globalization of commerce. The hearings also will provide an opportunity to examine changes that have occurred in marketing and technology over the past decade, and to garner experts' views on coming challenges and opportunities for consumers, businesses, and governmental bodies. Various issues regarding broadband Internet access services will likely arise in the context of those hearings.

⁷ Federal Trade Commission, 2006 Hearings on Global Marketing and Technology, <http://www.ftc.gov/bcp/workshops/globalmarketing/index.html>.

Question #8: Is there anything the FTC would ask of Congress in order to clarify jurisdictional divisions and/or facilitate the FTC's work with regard to protecting consumers in the broadband Internet access marketplace?

During the two most recent reauthorization hearings, the Commission opposed the gap in its jurisdiction created by the telecommunications common carrier exemption, noting that the exemption is outdated.⁸ As illustrated by the broadband Internet access marketplace, technological advances have blurred the traditional boundaries between telecommunications, entertainment, and high technology.

Further, as Congress considers legislation on broadband Internet access, the Commission believes that any such legislation should clearly preserve the FTC's existing authority over activities currently within its jurisdiction, such as broadband Internet access. We note that some recent legislative proposals would assign to the FCC specific competition and consumer protection authority regarding such activities, and could be misread to oust the FTC from its established jurisdiction. Over the past decade, the FTC successfully has prosecuted a wide range of enforcement actions involving activities related to Internet access. We would be concerned that any explicit or implicit diminution of the FTC's existing jurisdiction would restrict our ability to protect consumers from harm and ensure robust competition.

In addition, as you know, this Committee passed the International Consumer Protection Act, H.R. 3143, at the end of the 108th Congress. A similar bill recently passed the United States Senate as S. 1608, the "US SAFE WEB Act." The Commission continues to recommend that Congress enact the US SAFE WEB Act, which would address limitations in the FTC's ability to investigate cross-border fraud, particularly fraud with an Internet component, and has issued a report titled "The US SAFE WEB Act: Protecting Consumers from Spam, Spyware and Fraud."⁹ Although not focused specifically on broadband Internet access services, the proposed legislation

⁸ *The Reauthorization of the Federal Trade Commission: Positioning the Commission for the Twenty-First Century: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the House Comm. on Energy and Commerce, 108th Cong. (2003) ("FTC 2003 Reauthorization Hearing")* (statement of the Federal Trade Commission), available at <http://www.ftc.gov/os/2003/06/030611reauthhr.htm>; see also *FTC 2003 Reauthorization Hearing* (statement of Thomas B. Leary, FTC Commissioner), available at <http://www.ftc.gov/os/2003/06/030611learyhr.htm>; *FTC Reauthorization Hearing: Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the Senate Comm. on Commerce, Science and Transportation, 107th Cong. (2002)* (statement of Sheila F. Anthony, FTC Commissioner), available at <http://www.ftc.gov/os/2002/07/sfareauthtest.htm>.

⁹ Federal Trade Commission, *The US SAFE WEB Act: Protecting Consumers from Spam, Spyware, and Fraud: A Legislative Recommendation to Congress*, (June 2005), available at <http://www.ftc.gov/reports/ussafeweb/USSAFEWEB.pdf>.

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would, among other things, help the FTC fight deceptive spam and spyware by allowing the agency to investigate more fully messages transmitted through facilities outside the United States.

Question #9: Currently, most broadband Internet access services are provided over either a cable or traditional telecommunications infrastructure. Concentration clearly affects market dynamics in network industries that require cooperation, such as interconnection. Do you believe it would be appropriate for the same government agency to have merger review authority for all broadband Internet access service-related mergers?

Mergers in nearly all industries are reviewed by one of the two federal antitrust agencies, the FTC and DOJ. In addition, some specialized agencies, such as the FCC, the Federal Energy Regulatory Commission, and the banking agencies, have certain nonexclusive authority to review mergers, potentially taking into account issues outside the antitrust laws. We do not believe it is necessary to assign a single agency to review all mergers relating to broadband Internet access services. The federal antitrust statutes are flexible enough to account for unique industry characteristics, including those aspects of network industries that differentiate them from some more traditional industries. The two antitrust agencies have long-standing coordination procedures that both allow them to consider those complex issues and keep them from pursuing inconsistent or duplicative efforts. The FTC's and DOJ's clearance procedures ensure that only one antitrust agency investigates a particular merger.

The Commission notes that none of the information in this letter is exempt from mandatory public disclosure under the Freedom of Information Act, 5 U.S.C. § 552. Therefore, we do not request that the Committee give confidential treatment to the letter.

We appreciate your consideration of our views.

By direction of the Commission.


Deborah Platt Majoras
Chairman